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IN THE

Supreme Court of the United States

October Term, 1961
No. 275.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, Trustee,

Petitioners,

vs.

SUNKIST GROWERS, INC., a corporation, and EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Re-Statement of Questions Presented.

1. On an appeal to a United States Court of Appeals from a judgment based upon a jury verdict in a treble-damage case under the antitrust laws, is it within the power of the reviewing court to reverse the judgment upon the ground that the evidence, upon which the jury's award of damages was based, was speculative and conjectural and, therefore, was insufficient to support the verdict?

2. When substantial evidence offered by the defendant in such a case, which bears directly upon the issue of damages, is erroneously excluded by the trial court and it does not affirmatively appear from the whole

record that the error was harmless, may the Court of Appeals properly conclude that the error was prejudicial?

Counter-Statement of the Case.

1. Preliminary Comment Upon Petitioners' Statement.

Petitioners' statement is largely irrelevant. It deals in the main with evidence bearing upon the issue of liability. The Court of Appeals, however, affirmed on that issue [R. 4004] so that petitioners can have no complaint on that score. For the purpose of reviewing the lower court's decision as to damages it makes no difference what the evidence of liability may have been. The issue of damages—and that is the only issue open to or presented by petitioners—is not reached unless it is held, or assumed *arguendo*, that liability has been established.[1] Even so, petitioners' statement of the

[1]Respondents here have petitioned for a writ of certiorari aimed at so much of the judgment below as affirmed on the issue of liability. [*Sunkist Growers, Inc., et al. v. Winckler & Smith Citrus Products Co., et al.*, Oct. Term, 1961, No. 241.] Reference may be made to that petition for a summary of the evidence relating to the organization of respondents here as an agricultural cooperative association; to the nature and extent of the present petitioners' business and their sources of supply; to the market data bearing upon delineation of the relevant market; and to other matters involved in the issue of liability.

Each petition must, of course, stand upon its own footing. The "Memorandum For Respondents" filed in No. 241 by the present petitioners fails to distinguish between the case as a whole and the questions raised in it. The questions presented by us in No. 241 for the reasons there stated, which are not denied by the respondents there, are questions of law of general public importance. The questions presented in the instant petition, however, are questions of fact and, for the reasons stated in this brief, are of no general or precedential importance.

evidence relating to liability is incomplete and in some material respects erroneous. Because of its irrelevancy to the questions here presented we need not occupy the Court's time with a correction and supplementation of it. A few illustrative instances, however, are noted in the margin.[2]

With respect to the "damages" portion of petitioners' statement we think it will make for more convenient reading if, instead of attempting a piece-by-piece correction or supplementation of it, we present our own counter statement in consecutive narrative form.

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[2] In 1951, petitioners say, Sunkist had a surplus of 31,000 tons of by-product oranges available for sale to others. [Pet. 5-6, 7.] In fact there was no surplus. The disposition of Sunkist's supply in that year was the subject of a stipulation of fact between the parties [R. 537-538], which showed that the oranges were "either sold by Sunkist [to] independent processors or were processed by or at the direction of [it]" . . . The greater part . . . was processed into citrus fruit juice. The balance not so processed was processed into cattle feeds or other products." [R. 540-541. See also, R. 863.

The crux of petitioners' position in respect of liability is that, being a "regular customer" of Sunkist, they were unable "in 1951 to secure oranges from respondents" for processing into single-strength orange juice, their "principal product," on terms comparable to those given their competitors as an asserted consequence of which they were forced out of business. [Pet. 4-5, 12.] The facts are these: Petitioners were not, and since at least 1947 had not been, a regular customer of Sunkist. [R. 806-8, 802. Pet. Appendix A, 18a-19a.] For several years prior to 1951 they had gotten only a small part of their orange requirements from respondents, but relied mainly on another supplier, Independent Citrus Growers & Shippers Association. [R. 636-637, 641-642, 687-689, 1005-1006, 1012-1016, 1431-1450, 1587-1591, 1596-1597. Exhibits 54 (R. 1587), 55 (R. 1588), 81 (R. 2008), and 139 (R. 2611).] In

2. Statement of the Evidence Relating to Damages.

Petitioners' evidence on the subject of damages took two forms.[3] There was testimony relating (a) to the claim of loss of anticipated profits in the year 1951; and (b) to the loss (not the depreciation in value) of Winckler's plant through forced or bankruptcy sale. On the other hand, a large part of the evidence offered by respondents in opposition to the claim of damage was excluded.

(a) *Winckler's Profit and Loss Record:* From the commencement of its operations in 1940 until the beginning of its fiscal year 1951, Winckler's operations had resulted in an overal loss, according to its own

1951 Sunkist had 318,000 tons of by-product oranges or 70% of the total supply. [R. 541, 688.] Petitioners' regular supplier had an ample stock of oranges from which to supply petitioners—from 12% to 15% of the total supply in the California-Arizona area, or over 54,000 tons. [R. 1581, 1600.] It had supplied oranges to another of petitioners' competitors for processing into single strength juice; and to petitioners for processing into concentrate, in 1951. But it refused to let petitioners have any oranges for single-strength juice in that year because it did not want to have its oranges "out in the market in canned juice form, competing against each other." [R. 1439-1440, 1598-1601, Exhibits AX, (R. 1573, 1574-1575), 55 (R. 1580).] This refusal followed petitioners' efforts to get oranges from Sunkist; and the latter is not shown to have had anything to do with the refusal or even to have known of it. [R. 608, 615-616, 857-858, 1058-1070, 1576-1578, 1599-1602, 2008-2009. Exhibit 45 (R. 1964).] At the time petitioners requested fruit from Sunkist, the latter's entire anticipated supply for the year was fully accounted for. [R. 803, 594-595, 609, 611-614, 671-676, 685-686, 691-707, 749-751, 2004-2008, 2072-2099.]

Petitioners say that the juice prices of Sunkist and its alleged co-conspirators were the same. [*Pet.*, 10.] The uncontradicted evidence showed that they were not; that, in fact, they varied from each other frequently and in an irregular pattern. [Exhibits 27 (R. 816), 28 (R. 816), 30 (R. 916), R. 815-819, 984-986, 3057.]

[3] For convenience we still refer to the petitioners as "Winckler."

bookkeeping records. That overall loss was $6,993.19. The yearly losses ranged from $11,771.34 in 1946 to $85,200.31 in 1948. [R. 1195-1208, Exs. A-3 (R. 2019), A-4 (R. 1764-1765), and B (R. 3073).][1] In 1949 Winckler's records reflected a gain of $121,360.21; and one of $40,845.53 in 1950. [Exs. 61 (R. 1659) and B (R. 3073).] However, neither in those years, nor in any other, did Winckler pay any income tax. [R. 1192-1194.] In 1951—the year of the alleged restraint—Winckler's records reflected a loss of $184,523.20.[2] [Ex. 65 (R. 1692).]

(b) *The Hypothetical Loss of Profits in 1951.* On this phase of their case petitioners relied upon the testimony of Robert Hodge, their accountant. Mr. Hodge was a certified public accountant in general practice, among whose clients was Winckler. He was not shown to have had any other fruit processing client; and by his own admission [R. 1669], was not familiar with the accounting or business of any other processor. He had never been a fruit processor and professed no knowledge of the business beyond that gleaned from his work on

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[1] There was other testimony, based, in part, upon audits and examinations caused to be made by respondents, that the aggregate loss for this period was more nearly in excess of $310,000.00. [R. 1735-1736, 1783-1784, 1798, 1809-1810, 2033-2041, 2074-2081, 2100-2101, 2358-2367, 2371-2372, 3110.]

[2] There was other evidence to the effect that in 1949 Winckler's operations resulted, not in a gain, but a loss of more than $80,000.00. [R. 1735-1736, 1783-1784, 2037-2041, 2074-2075, 2100-2104, Exhibit BB (R. 2994).] And that in 1950 there was a loss of about $142,000.00 rather than any gain. [R. 1663-1666, 1669, 1809-1810, 2074-2081, 2100-2101, 2361-2367, 3110.] 1949 and 1950 were the only two years that even Winckler's own records tell us is profitable.

[3] Other evidence put this loss at about $147,000.00. [R. 2370-2371, 3111.]

Winckler's records. He was not offered or qualified as an expert on the fruit-processing business; and the trial judge commented to the effect that he had not been qualified as such an expert. [R. 1626-1628, 1669, 1713, 1726-1727.]

Hodge gave a hypothetical reconstruction of what, he asserted, Winckler's profits would have been in 1951 if they had gotten 12,000 tons of Valencia oranges, processed them into single-strength orange juice, and disposed of all the juice at a price assumed to have been gotten by another processor. His conclusion, upon the indicated hypothesis, was that there would have been a profit of $10,000, later changed by him to $25,231.45, rather than the loss that was incurred in that year. [R. 1713-1715, 1721, 3118. Ex. 69A (R. 3103).] To reach that conclusion, Hodge had to make certain assumptions of fact. These assumptions, when not contrary to petitioners' own evidence in the cause, were not based upon any evidence. It was the indispensability of these assumptions to Hodge's conclusion and their lack of support in, and conflict with, the factual evidence, that impelled the Court of Appeals to hold that petitioners' evidence of loss of anticipated profits "rested upon surmise, conjecture, and guess work, and that the amount found as damages was not logically or legally inferrable from the facts in evidence before the jury. The expert opinion was a guess based on conditions contrary to fact . . ." [R. 4001-4003; *Pet.* Appendix A, 64, 66-68.]

The assumptions upon which Hodge's testimony rested, and the evidence or lack of evidence relating to them, follow.

(1) He assumed that Winckler would get and process into single-strength juice 12,000 tons of Valencia oranges. [R. 1713-1715. Ex. 69A (R. 3103).] Winckler, however, had never processed that large an amount of single-strength orange juice. In 1949, the best year it ever had, it used only 9000 tons for that purpose. [R. 1004, 1015, 1027.] In other years the quantity so used was very much less, *e.g.*, in 1950 (the only other allegedly profitable year), out of a total supply of 8300 tons of Valencias, less than 6200 tons were used for single-strength orange juice. [R. 1004, 1027; Exs. BP (R. 2408), BQ (R. 2411) and BQ (R. 2403).]

(2) Hodge assumed that all of the single-strength juice processed from the added 12,000 tons would be sold by Winckler. [R. 1715, 1979. Ex. 69A (R. 3103).] In fact Winckler in its entire history had never sold anywhere near that quantity. In its biggest year it packed the juice from only 9000 tons; and it is not clear from the record that it sold all of the pack. [R. 1004, 1015, 1027.] In that year it had 708 single-strength customers. In the following year—the only other profitable year in its history, and the year immediately preceding the year here involved—it had only 93 of those single-strength customers left. [R. 2597-2599.] And in 1951, Florida very largely overproduced with the result that the market for this type of juice was depressed. [R. 2182-2185.]

(3) Hodge assumed that all of the juice from the 12,000 tons would be sold at a price of $62.74 per ton.[7]

[7] Canned single-strength orange juice is customarily packed in varying size cans and is sold in case-lots at a per-case price. [See, Exs. 27, 28 and 30, *passim*. R. 1900.]

[R. 1715, 1717, 1859-1861, 1891-1892, 1983-1985; Exs. 67 (R. 1710), 69A (R. 3103).] This assumed price, he further assumed, was the price received by TreeSweet when it sold the juice processed under its processing contract with Sunkist. [R. 1707-1709, 1692-1693, 1690-1699; Ex. 67 (R. 1710).] The assumed price was not derived from market data or from any evidence of the prices actually received by TreeSweet.[5] Furthermore, the evidence was that Winckler's prices generally were not the same as, but lower than, either TreeSweet's or Sunkist's prices. [R. 850-851, 889, 919-920, 1454-1457, 1480-1484.]

(4) Hodge assumed that if Winckler had been given a processing contract with Sunkist similar to TreeSweet's, Winckler would have been paid $35.57 per ton by Sunkist for processing the fruit, whereas Winckler's assumed cost for 1951 would have been $34.06 per ton. [R. 1716-1717, 1858, 1870-1871, 1973-1977.

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[5] Hodge arrived at his "TreeSweet price" in an indirect and artificial manner. He converted tons of fruit into cases of juice, disregarding variations in can and case sizes and quantities. To the total number of cases so derived he applied the per-case trade allowances provided for in the TreeSweet contract; and then added the price to be paid to Sunkist by TreeSweet under that contract, less trade discounts. This gave him a figure of $62.74 per ton. He assumed that the price to be paid Sunkist, without allowances or discounts, was the price at which TreeSweet sold. [R. 1693-1710, 1860-1861, 1900-1901; Exs. 66 (R. 1706) and 67 (R. 1710).]

He made a similar calculation for the juice bought by Silzle under its processing contract with Sunkist, arriving at a price of $57.03 per ton. [R. 1693-1710, 1860-1861, 1901; Exs. 66 (R. 1706), 67 (R. 1710).] Because that price was lower than the reconstructed TreeSweet price (and, therefore, presumably less favorable to the thesis he was attempting to support) he chose the higher TreeSweet sales price as the basis of his calculation of Winckler's hypothetical profit in 1951. [R. 1863-1864, 1888.]

Ex. 67 (R. 1710), 69A (R. 3103).] The difference multiplied by the number of tons, he treated as gain or profit to Winckler. [R. 1716-1717, 1921-1923, Ex. 69A (R. 3103).] The contract with TreeSweet, however, provided for payment for processing at TreeSweet's actual cost. [R. 756, 762-763, Ex. 20, schedule 1 (R. 738).] A similar arrangement with Winkler, therefore, would have resulted in payment of no more than the latter's actual cost.

(5) The figure of $34.00 per ton used by Hodge as Winckler's cost in 1951 for processing the additional 12,000 tons was itself a hypothetical and factually unsupported figure. He merely assumed that in 1951 Winckler's costs would have been the same as they had been in 1949. [R. 1716, 1858, 1904-1905.] He did not know whether there had been, and he gave no effect to, any increase in the cost of doing business since 1949 [R. 1902-1905]; even though common knowledge, as well as evidence in the case,[9] disclosed that at least since the Korean War this country has been enmeshed in an inflationary spiral.[10] Winckler's costs in 1950 were certainly higher than they had been in 1949, according to the testimony of the company president.

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[9]Mr. Winckler (president of the corporate petitioner) himself testified that in the period 1946-1950 his average cost of putting juice into cans was $1.35 per case, but that in 1950 it would have been "substantially higher." [R. 1026, 1029.] And a 1951 plant appraisal put in evidence by petitioners made an upward correction of 8% in 1950 values "due to the increasing prices since the Korean War . . . ." [R. 1167, Ex. 51 (R. 1478), letter preceding p. 1 of exhibit.]

[10]An analysis of Winckler's records made by respondents' auditors showed that its costs in 1951 were very much higher than they had been in 1949. [R. 2433-2436, 2507-2513, Ex. FR (R. 2467).]

[R. 1026-1036.] Hodge did not include in his cost computation any allowance for the cost of selling the juice that would have been processed from the additional 12,000 tons. [R. 1870.] Winckler's president, however, testified that its selling expense would be 7% or 8% of the gross sales price. [R. 1037-1038.]

In addition to Hodge's testimony there was some very general testimony given by Winckler's president that, assuming normal processing operations in 1951 and the existence of a processing arrangement with Sunkist similar to TreeSweet's, a profit would have been made. [R. 1093.] No reasons were given for that opinion; no estimate of amount of profit was vouchsafed or even intimated. It was and remained a bare expression of opinion without discernible basis or foundation in proved facts.[11]

(c) *The Value of and Injury to Winckler's Plant.* A reproduction-cost appraisal of Winckler's plant and equipment was made in February, 1950, for insurance purposes. [R. 1460-1461.] It placed a value on the property of $602,424.61. [R. 1462-1463. Ex. 51 (R. 1478).] In January, 1951, the same appraisal company rechecked the valuations to include some new property and to "determine whether there might be an increase on account of the increase in costs since 1950 . . ." [R. 1463.] This recheck resulted in "a correction in the general value due to increasing prices

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[11] A bare and unsupported opinion of that sort can hardly be called even a scintilla of evidence. [*N.L.R.B. v. American Pearl etc. Co.*, 8 Cir., 149 F. 2d 311, 318; *State of Washington v. United States*, 9 Cir., 214 F. 2d 33, 43; *United States v. Honolulu Plantation Co.*, 9 Cir., 182 F. 2d 172, 178. See, also, *N.L.R.B. v. Columbian E. & S. Co.*, 306 U.S. 292, 299-300.]

since the Korean War . . . of approximately 8 per cent. . . . ." [R. 1167, Ex. 51 (R. 1478) letter preceding page 1 of exhibit.] The property was sold at a forced or bankruptcy sale in February, 1954 for $100.00, subject to all encumbrances. [R. 1181-1184.] There was no evidence of its value at that time; or of any depreciation in value it may have suffered at any time.

The acquisition cost of the property cannot be accurately determined from the record. It seems to have been about $127,000. [R. 1140, 1465-1468.] It does appear, however, that early in 1949, at the time of an earlier bankruptcy sale, the property was carried on Winckler's books at a value of about $309,000.00. [R. 1148, 1151-1153.] It was reacquired April 10, 1951 by Winckler [R. 1681, 1820] and its book value was then written up for about $732,000.00. This was the culmination of a series of write-ups that had progressively increased the book value several times over its acquisition cost. [R. 1094-1095, 1141-1147, 1151-1152, 1165-1168, 1459-1467, 1624-1625, 1746-1747, 1819-1821.]

The property in question was subject to a trust deed and a chattel mortgage securing a loan from the Reconstruction Finance Corporation in the amount of $100,000.00 obtained in January, 1947. At the time Winckler reacquired the property in April, 1951, the balance of principal due was $50,499.04, payable in monthly installments of $1500.00, with the entire balance due as a balloon payment on February 5, 1952. [R. 1020-1021, 1025, 1184, 1826-187, Ex. 78 (R. 1996).]

Interest was paid to July 15, 1951, but no payments on principal had been made at any time after the reacquisition. On July 20, 1951, RFC declared the loan in default, accelerated payment of the entire outstanding balance, and commenced foreclosure sale proceedings. The foreclosure sale was set for a date in March, 1952. A day or two before that date Winckler started bankruptcy (Chapter X) proceedings, as a consequence of which the foreclosure sale was enjoined. In 1954 the bankruptcy trustee sold the property for $100.00, subject to all encumbrances. It was sold to the brother of one of Winckler's stockholders, who was acting as trustee for this stockholder and another. The purchasers were loan-creditors of Winckler holding a second trust deed on the property as security. [R. 1088-1089, 1181-1186, 1190-1192, 1824-1826, 1828, 1835, 1917, 1996, 2000-2003, Ex. 78 (R. 1996).]

The Court of Appeals held that the loss of Winckler's plant, as the consequence of the alleged antitrust violation, was "collateral, remote and conjectural . . ." [R. 4002; *Pet.*, Appendix A, 66.]

(d) *Respondents' Evidence Excluded.* Respondents sought, unsuccessfully in the trial court, to introduce evidence showing that, for reasons having nothing to do with their alleged violation of the antitrust laws, Winckler's hope of profits in 1951 was ill-founded; as well as evidence showing that Winckler in its entire history had never made a profit. This was that evidence:[12]

[12] "We state the proceedings in the trial court in some detail because of petitioners' cryptic remark that they reserve the right to argue whether the Court of Appeals could find 'prejudicial error' on the basis of the exclusion of evidence which was never offered." [*Pet.*, 3 (n.3).]

(1) In 1949 and 1950—the only two years in which Winckler ever claimed to have made a profit—its federal and state income tax returns reported heavy net losses rather than any profit. [R. 2033-2036, 2053-2061, 3076-3077. Exs. (for identification) F (R. 1217) and F-1 (R. 1217).] Attempts to elicit that fact from an accountant who had examined Winckler's records were stopped by the trial judge upon an objection, without statement of grounds, "to any inquiry along that line . . ." [R. 2033, 2034-2035.] Later, after a request that the returns be made available [R. 2053-2060], the trial judge sustained "the objection on the ground that the request comes too late . . . and any other valid grounds of objection made by the plaintiff." [R. 2060.] A moment later the trial court added this: "The objection is sustained. You [respondents] would be going into extraneous issues, and the other reasons I stated . . . The objection is sustained." [R. 2061.] The returns themselves were ultimately offered in evidence by respondents. Again, an objection by petitioners—this time, that they were irrelevant and immaterial—was sustained. [R. 3076-3077.] In making that ruling the trial judge said, ". . . I have already gone over this matter and wherever I refer to it in the record, I incorporate whatever remarks I then stated about Federal tax returns." [R. 3077.]

(2) Extensive evidence was offered to show that Winckler's single-strength juice was intentionally and consistently adulterated by the addition to it of tapwater, citric acid, sugar and other additives; that it was frequently impure and unsterile and contaminated by the presence in it of dirt and the residue from rotten

fruit; and, that the labels on the containers in which the juice was marketed did not disclose the addition of anything to it, but represented it to be the pure and natural juice of the orange. [R. 908-909, 1109-1112, 1121-1122, 1412, 1413, 2528-2534, 2553, 2564-2572, 2581, 2595, 2664-2671. Exs. 1-1 to 1-4 (R. 2524, 2533).] To that offer of proof petitioners objected that it was irrelevant and would not tend to prove or disprove any issue in the case. [R. 2534, 2569, 2595, 2666, 2672, 3021, 3024, 3089.] The offered evidence was excluded.[13] [2561-2563, 2569, 2570-2572, 2666-2667, 2671-2673.] The culmination of the trial judge's rulings on this offer of proof was his statement for the record, obviously intended for the reviewing court, that if there were other reasons for excluding the evidence, other than those he had already mentioned, he invoked "the benefit, in sustaining my ruling, of those reasons that I may not have thought of, which would validly sustain my ruling on this offer of proof." [R. 2673.] Respondents also attempted to prove, but were precluded from doing so by the trial court's rulings, that brokers handling Winckler's products had frequently complained of their quality. [R. 1310, 1318, 1320, 1323-1337, 1348-1350, 1372, 1380, 1382-1383, 1385, 1392-1398, 1502-1519, 1551-1554, 3093-3095.]

(3) Letters had been written by Winckler to some of its customers in which its inability to provide single-strength orange juice in 1951 was attributed to the

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[13] Before any objection to the evidence had been made, a small part of it got into the record. [R. 2527-2561. Exhibits (for identification) 1-1 (R. 2524), 1-2 to 1-4 (R. 2533).] That part, however, was stricken by the trial judge, after an objection to further testimony on the subject was made. [R. 2569.]

short supply of California fruit, the heavy local bookings for juice made by Winckler, or the excessive Florida inventory that had driven prices down to an unreasonably low level. [Exs. (for identification) DT (R. 2757), DV (R. 2759), and DX (R. 2762).] They were offered in evidence by respondents. There was no objection to foundation or authenticity; but only an objection that the person "who wrote this letter was before the Court this morning for examination on this question . . . ." [R. 2757-2758, 2759-2760; 2762-2763.] The objection was sustained, the trial judge saying, in substance, that ordinarily the letters would be admissible as an admission, but they should have been considered at the time the writer was on the stand. [R. 2758, 2760, 2763.]

(4) In Hodge's computation of the hypothetical 1951 profit, an important element was, of course, the cost of the fruit to the processor under an arrangement similar to the one TreeSweet had with Sunkist. Under that arrangement the orange peel and the oil processed therefrom (which had a substantial market value) belonged to Sunkist. [R. 750, 2950-2958. Ex. 20 (R. 738).] Accordingly, respondents prepared computations that took this factor into account and showed that when it was given its just due the cost of fruit to Winckler would have been substantially higher than the cost assumed by Hodge. Appropriate interpolation of the cost of fruit so derived into Hodge's calculations would result in a conclusion of loss rather than a profit for 1951. [R. 2161-2167, 2380-2384, 2473-2481, 2491-2499. Exs. (for identification) BS (R. 2161), BT (R. 2161a), and CD (R. 2473).] Respondents also

sought to elicit from their accountant-witness the fact that Hodge had omitted this factor in his computations. Largely on the trial judge's own motion, the testimony and the exhibits were excluded entirely. [R. 2167, 2474, 2479, 2492-2493, 2495, 2498-2499, 2447-2448.]

(5) To the question whether the cause of Winckler's inability to operate at a profit in 1951 was the result of respondents' acts or of other causes for which respondents were not responsible, evidence was offered to show that prior to 1951 the corporate petitioner's chief officer and certain of its stockholders had "milked" the company; *i.e.*, had caused to be paid to themselves by way of salary, bonuses, forgiveness of debt, and rental payments, a sum exceeding $288,000.00. [R. 2243-2260, 1286-1292, 1300-1305, 2113-2114, 2167-2168, 2061-2073, 3092-3093. Exs. (for identification) BH (R. 2243), BI (R. 2113), BM (R. 2070), and BN (R. 2071-2072).] Petitioners' objection on the ground of irrelevancy and immateriality [R. 2244, 2247, 2253, 2254, 1290, 1292, 2063-2064, 2069-2070, 2072] was sustained. [R. 2244-2246, 2247-2250, 2253, 2255-2256, 2258-2259, 2072, 2167, 1292, 3092-3093.] That ruling was, later, somewhat relaxed to permit respondents to interrogate Winckler's president as to salary, allowances and bonuses paid him in 1949, 1950 and 1951, but not any paid in earlier years. [R. 2266-2268.]

ARGUMENT.

I.

The Question Relating to the Sufficiency of the Proof of Damages Presents Nothing of Public or Precedential Importance, but Only a Question of Fact Upon Which Another Hearing Is Desired by Petitioners.

1. The Question Involved Is Wholly One of Fact.

Although it is dressed in the seemingly impressive guise of a constitutional question arising under the Seventh Amendment, the first of the questions presented by petitioners in this cause involves nothing more than a request that this Court review the lower court's interpretation and appreciation of the evidence. The Court of Appeals, after due consideration of the record in the cause, concluded that the evidence relating to the damages allegedly suffered by the petitioners was insufficient to support the verdict upon which the judgment favorable to petitioners was based. It reached that conclusion because, in its view, conjecture and guesswork had been made to serve the office of proof. [R. 4000-4003; *Pet.*, Appendix A, 63-68.]

Traditionally, this Court has set its face against exercising its discretionary jurisdiction to bring before it a question that depends, as does the one at bar, merely upon an appreciation of the evidence. [*Houston Oil Co. v. Goodrich*, 245 U. S. 440; *General Talking Pic. Corp. v. Western Elec. Co.*, 304 U. S. 175, 178.] The Court has said ". . . This is not the place to review a conflict of evidence nor to reverse a Court of

Appeals because were we in its place we would find the record tilting one way rather than the other . . . we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' . . . ." [*N. L. R. B. v. Pittsburgh S. S. Co.*, 340 U. S. 498, 503.]' In short, certiorari "jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing . . . ." [*Magnum Import Co. v. Coty*, 262 U. S. 159, 163.]

No doubt an appellate court, canvassing the evidence to determine its legal sufficiency to support a verdict, may on occasion err in its ultimate conclusion. But when such an error happens to be made nothing "is gained by blowing [it] up into a denial of the constitutional right to a jury trial . . . ." [*Smith v. Reinauer Oil Transport, Inc.*, 1 Cir., 250 F. 2d 646, 649, quoted by Frankfurter, J., dissenting, in *Dick v. New York L. Ins. Co.*, 359 U. S. 437, 450.] Juries as finders of the fact are no more permitted, than are judges sitting without a jury, to base their findings upon insufficient evidence. Speculation cannot supply the place of proof in any case, jury or nonjury. [*Moore v. Chesapeake & O. R. Co.*, 340 U. S. 573, 578; *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 264; *Galloway v. United States*, 319 U. S. 372, 395; *New York C. R. Co. v. Ambrose*, 280 U. S. 486, 489-490.]

Since "a jury verdict must be based on evidence . . . it has always been the function of the court to see to it that jury verdicts stay within that boundary . . . the Seventh Amendment [has not] lifted that duty from the courts . . . ." [Harlan, J., dissenting

in *Rogers v. Missouri P. R. Co.*, 352 U. S. 500, 503-504.] Indeed, the reports abound with cases in which this Court, upon the ground of the insufficiency of the evidence to support the jury's verdict, has reversed a judgment based upon such a verdict or has affirmed a lower appellate court's reversal so grounded. A few of the many cases that could be amassed to this point are cited in the margin.[1]

So it is plain that there was nothing new or unorthodox in the approach to review and decision that was taken in the instant case by the Court of Appeals. No question of public importance or of potential precedential value arises from that approach. The question that does arise—whether the evidence of damage is legally sufficient—is of importance only to the parties; and its resolution depends wholly upon the particular facts peculiar to this case. It is far from being the kind of a question to which the time and energies of this Court ought to be directed. [*Layne & Bowler Corp. v. Western Well Wks.*, 261 U. S. 387, 393; *Rice v. Sioux City Cemetery*, 349 U. S. 70, 77-79.]

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[1] *Pence v. United States*, 316 U. S. 332, 338; *Inman v. Baltimore & O. R. Co.*, 361 U. S. 138, 140-141; *Umatilla Valley R. Co. v. Caldine*, 278 U. S. 139; *Kansas City S. Ry. Co. v. Jones*, 276 U. S. 303, 304-305; *Chicago G. W. R. Co. v. Rambo*, 298 U. S. 99, 102-103; *Lumbra v. United States*, 290 U. S. 551.

In some of these cases it was the judgment of a state court that was reversed. That fact makes no difference in principle; for the Seventh Amendment's prohibition of re-examination of a fact determined by a jury is as applicable to federal review of a state judgment as it is to review of a federal judgment. [*Chicago, Burlington etc. Rd. v. Chicago*, 166 U. S. 226, 242-243.]

2. The Special Considerations Involved in F.E.L.A. and Jones Act Cases Are Not Applicable Here.

Petitioners, recognizing "the reluctance of this Court to consider factual questions . . . ." [*Pet.*, 19], invoke the analogy of the Court's certiorari policy in cases arising under the Federal Employers' Liability and Jones Acts. [*Pet.*, 20.] The invocation, we respectfully suggest, must be in vain. The considerations applicable to cases under these acts are quite different from those that should govern cases such as the one at bar.

Under F. E. L. A., an important federal policy was left very largely to the administration of the state courts. [45 U. S. C. A., §56.] That is also true of the Jones Act; as an action under it may be brought in a state court. [*Garrett v. Moore-McCormack Co.*, 317 U. S. 238, 243.] Uniformity of practice and philosophy, therefore, could only be achieved, when aberrations appeared, by the exercise of this Court's supervisorial function. In the administration of the acts there soon arose, not merely occasional or sporadic, but frequent and persistent deprivations by lower courts of the right to a jury determination of facts. [See *Rogers v. Missouri P. R. Co.*, *supra*, 352 U. S. at 511; *Wilkerson v. McCarthy*, 336 U. S. 53, 55; *Dehison, T. & S. W. R. Co. v. Saxon*, 284 U. S. 458, 459.] As a consequence, and because of this special and important reason applicable to an entire class of litigation, this Court's discretionary jurisdiction has been exercised on a good many occasions in respect of cases falling within that class. Leaving on one side the sharp disagreement within this Court over the wisdom of this policy [see *Rogers v. Missouri P. R. Co.*, *supra*, 352

U. S. at 509-510, 524-548, 559; *Scantlles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 111, 112] it is nonetheless clear that nothing advocated by its most ardent proponents suggests or even intimates that in any other class of litigation the traditional limitation of certiorari jurisdiction to questions of public importance should be broken down.

Treble-damage cases under the federal antitrust laws are not at all comparable to those that have come to this Court under F. E. L. A. or Jones. Uniformity of decision and philosophy under the Sherman and Clayton Acts can be maintained through the ordinary federal appellate process; for state courts have no jurisdiction of cases arising under them. As in any other type of case committed exclusively to the jurisdiction of the federal courts, correction of error is a job for the Courts of Appeals; final disposition of questions of significant public importance, and maintenance of uniformity of decision, are matters for the supervisorial function of this Court. Notwithstanding that the private action for damages is a supplementary and significant method of enforcing the antitrust laws, it still remains a fact that many of the questions decided in such an action are of importance only to the parties. When the Congress gave this Court control of its appellate docket [Act of Feb. 13, 1925, 43 Stat. 936] by restricting its obligatory and enlarging its discretionary jurisdiction, the private antitrust suit was a familiar device. Nothing in the arguments advanced for adoption of that legislation, or in the course of practice under it, give the slightest hint that for the purposes of review by this Court, such suits are to have a special and preferred rank. [See *H. Rep.* No. 1075, 68th

Cong., 2d Sess., pp. 2-4, 7-8; *Ex parte Republic of Peru*, 318 U. S. 578, 585 (n.4).].

There has not been, with respect to treble-damage cases as a class, or in the case at bar, any suggestion, direct or atmospheric, of an unwillingness by the Courts of Appeals to enforce either the governing rules of antitrust law laid down by this Court or the policy of the legislation. There is not, therefore, the same reason for expanding the criteria for exercise of certiorari jurisdiction as there was in the cases coming up under the Federal Employers' Liability and Jones Acts.

3. The Constitutional Question Assertedly Involved Was Not Raised Below.

Petitioners' effort to inflate the factual question here involved into a constitutional question fails for still another reason. It was never raised below. Their complaint is that they were unconstitutionally deprived of a jury trial by the fact that the Court of Appeals reversed on the ground of the insufficiency of the evidence. [*Pet.*, 2, 19.] Since insufficiency of evidence was one of the grounds strongly urged below for reversal, the possibility that such a holding might eventuate was sufficiently anticipatable to have required raising of the constitutional question in the Court of Appeals even before that court's decision. [*Herndon v. Georgia*, 295 U. S. 441, 444-446.]

In any event, the claimed deprivation, if it occurred at all, was the result of action taken by the Court of Appeals. It was, therefore, incumbent upon petitioners to assert their claim of unconstitutional action in that court at the earliest opportunity. [*Howard Steel Wheel Co. v. Lewellyn*, 251 U. S. 511, 515-516; *John-*

son v. New York Life Ins. Co., 187 U. S. 491, 495.] They had an opportunity to do so in the form of a petition for rehearing, even assuming they had none earlier. [Cf., *Brinkerhoff-Farris Trust & Sav. Co. v. Hill*, 281 U. S. 673, 677-678; *Missouri v. Gehner*, 281 U. S. 313, 320.] They filed such a petition. [R. 4005.] Had they taken advantage of it to raise the constitutional issue now asserted, it would have been a simple matter to cause the record in this Court to reflect that fact. The failure of the record so to show must be taken as evidence that the question was not raised in the Court of Appeals. [Cf., *Hughes v. Wendel*, 317 U. S. 134; *Zimmerman v. Harding*, 227 U. S. 489, 496; *United States v. Copper Queen Mining Co.*, 185 U. S. 495, 497, 498-499.]

Because of their failure to raise it below, this constitutional question is not now available to petitioners. [*Lazen v. United States*, 355 U. S. 339, 362 (n. 16); *Duignan v. United States*, 274 U. S. 195, 200.] And, of course, certiorari does not lie to entertain a question that on the record it is not open to the petitioners to raise. [*McCullough v. Kammerer Corp.*, 323 U. S. 327; *Tyrell v. District of Columbia*, 243 U. S. 1, 5-6.]

4. The Judgment Sought to Be Reviewed Is Not Final.

Insofar as the judgment below was adverse to petitioners it reversed the trial court's judgment on the issue of damages and remanded the cause for a new trial on that issue. [R. 4004.] For purposes of appellate review, therefore, the judgment is not final because the litigation has not been concluded in the court of first instance. [*United States v. Beatty*, 232 U. S. 463, 466; *Gospel Army v. Los Angeles*, 331 U. S. 543, 546.]

No doubt, finality is not a jurisdictional prerequisite to review of a judgment of a United States Court of Appeals. It is nonetheless true that "it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance . . . ." [*Radio Station WOW Inc. v. Johnson*, 362 U. S. 120, 123-124. See, *The Conqueror*, 166 U. S. 110, 113.] Only reasons of pressing public importance will justify review of a non-final judgment by this Court. [*Hamilton Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 258.] Surely, decision of a question of fact decided by a Court of Appeals does not present a reason of such pressing public importance as to justify any examination of the question beyond that already had in the Court of Appeals. [See the cases cited, pp. 17-19, *supra*.]

5. The Approach of the Court Below to the Problem of Probative Sufficiency Accords With Settled Doctrine.

Petitioners' detailed discussion of the evidence [Pet., 21-25, 26-30], only underscores the point that there is nothing presented here but a question of fact. That discussion is apparently designed to show that the Court of Appeals did not correctly interpret or appreciate the damage evidence. We could counter with an equally long analysis of the record, leading to the conclusion that this evidence was, as the Court of Appeals held it to be, probatively insufficient. We need not, however, go to lengths so consuming of everyone's time. Resolution of the controversy by this Court would involve nothing more than another examination and interpretation of the evidence. That is not the office of certiorari jurisdiction.

The incontestable facts are that the evidence of loss of future profits was based upon assumptions of fact contrary to and not supported by the evidence in the cause. This was not a case in which the absence of proof was due to difficulties engendered by the wrong complained of. Every one of the assumptions upon which the opinion evidence here rested, if true in fact, could have been easily proved.[13] And even when the alleged wrong has made proof of damage difficult it is still true that "the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data. . . ." [*Bigelow v. RKO Radio Pictures, supra*, 327 U. S. at 264. See, also, *Keogh v. Chicago & N. W. R. Co.*, 260 U. S. 156, 164-165; *Flintkote Company v. Lysfjord*, 9 Cir., 246 F. 2d 368, 390-394, *cert. den.* 355 U. S. 835; *Baush Mach. Tool Co. v. Aluminum Co. of America*, 2 Cir., 79 F. 2d 217, 227; *Wolfe v. National Lead Co.*, 9 Cir., 225 F. 2d 427, 430-432, *cert. den.* 350 U. S. 915; *Central Coal & Coke Co. v. Hartman*, 8 Cir., 111 Fed. 96, 98.]

An opinion or estimate of even an expert—Mr. Hodge was no expert—"not supported by facts does not reach the dignity of evidence . . . ." [*N. L. R. B.*

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[13] For example, the prices for single-strength orange juice actually received in 1951 by Sunkist or FreeSwood, certainly a matter that could have been proved from the records of those concerns. The *subpoena duces tecum* and the liberal discovery provisions of the Rules of Civil Procedure are as applicable in antitrust actions as in any others. So, too, the value of the oil and peel from 12,000 tons of oranges, as a matter most likely proof could have been produced as readily as market value is generally proved. And Winkler's actual 1951 processing costs were surely matters upon which petitioners could easily have offered evidence.

v. American Pearl etc. Co., supra, 149 F. 2d at 318; *State of Washington v. United States, supra*, 214 F. 2d at 43; *United States v. Honolulu Plantation Co., supra*, 182 F. 2d at 178.] Here, the opinion rested on guesswork, not facts. It was not based on Winckler's past experience. It could not well have been. A past experience of loss is hardly a relevant datum from which to infer gain in the future. [*Bausli Mach. Tool Co. v. Aluminum Co. of America, supra*, 79 F. 2d at 227.]

Petitioners are in no better case in respect of loss of plant. It is clear from the evidence that bankruptcy was resorted to in order to stave off an immediately imminent foreclosure sale. [See, pp. 11-12, *supra*.] Forced sale was, therefore, inevitable, whether by foreclosure or in bankruptcy.[16] The only way that loss of the property through forced sale could be connected to respondents is by the contention that the inability to pay the indebtedness against the property, which started the chain of events leading to sale, was brought about by respondents' alleged wrong. That is, in effect, the contention that is made. [*Pet.*, 12.] The difficulties with it are twofold.

First, there was no evidence that petitioners were unable in 1951, from the asserted or any cause, to pay the comparatively modest monthly installments of principal that would have kept the RFC loan current.[17]

Second, as a matter of law, the result of forced sale because of inability to pay, is collateral to and remote

[16] Counsel for petitioners conceded in the trial court that the sale was a "forced" one. [R. 1175, 1177.]

[17] Winckler's sales revenues in fiscal 1951 were over $670,000.00. [R. 1087, Exhibit 65 (R. 1092).]

from the alleged cause. This was the view taken by the Court of Appeals, as is made clear by the cases it cited to the point. [R. 4002; *Pet.*, Appendix A, 66. The cases are: *Savings Bank v. Asbury*, 117 Cal. 96, 102, 103, 48 Pac. 1081, 1083; *Hartman v. Rogers*, 69 Cal. 643, 646, 11 Pac. 581; *De Lieve v. Goldberg, Bozeen & Co.*, 30 Cal. App. 612, 615, 159 Pac. 197, 198.] These cases stand for the rule that loss of income or of ability to pay a debt as the result of another's tort, or breach of contract, does not make the wrongdoer liable for property lost because of such inability to pay. The result is collateral and too remote from the cause. [See, also: *Westmoreland Asbestos Co. v. Johns Manville Corp.*, S. D. N. Y., 30 F. Supp. 389, 391, *affirmed on opinion below*, 2 Cir., 113 F. 2d 114; *Dipson Theatres v. Buffalo Theatres*, W. D. N. Y., 86 F. Supp. 716, 720-723, *affirmed*, 2 Cir., 190 F. 2d 951, *cert. den.* 342 U. S. 909. *Cf. Robins Dry Dock etc. Co. v. Flint*, 275 U. S. 303.]

It may also be noted that there was no basis in the evidence for an award of damages grounded upon depreciation of the value of the property. The property, in fact, had appreciated in value since February, 1950; and there was no evidence that its value at the end of 1950 had depreciated in any way or from any cause in 1951. [See, pp. 10-11, *supra*.] The price received at a forced sale is not, of course, evidence of value at that time. [*Dubinsky Realty Co. v. Lortz*, 8 Cir., 129 F. 2d 669, 674; *Hickey v. United States*, 3 Cir., 208 F. 2d 269, 275, *cert. den.* 347 U. S. 919; *Richer v. Burke*, 147 Ore., 405, 34 P. 2d 317, 322; *State v. Stymer*, 58 Ida. 233, 72 P. 2d 699, 704; *Thompson v. Boydstun*, 189 Okla. 530, 118 P. 2d 230, 238.]

Even if it were evidence of value at the time of sale, evidence of value in 1954 is not evidence of value in 1951. [*Glinsmann v. Ehrenpfort*, 29 Cal. App. 87, 91, 154 Pac. 481, 483; *Wegerer v. Jordan*, 10 Cal. App. 302, 304, 101 Pac. 1066, 1067.] The case, therefore, is not within the reach of decisions, such as *Story Parchment Co. v. Paterson Parchment P. Co.*, 282 U. S. 555, 567, in which there was competent proof of depreciation in value in or during the period of unlawful restraint.

II.

Whether Erroneous Exclusion of Evidence Was Prejudicial Is a Question Peculiar to the Specific Case, Without General of Precedential Implications.

The second of the questions presented by petitioners is only the question whether, in the particular circumstances of this case, an erroneous exclusion of evidence offered by respondents was prejudicial. In a question of that kind there is obviously nothing of general or public significance. It is a matter peculiar to the specific case in which it arises. [Cf., *Berger v. United States*, 295 U. S. 78, 83-84; *Kotteakos v. United States*, 328 U. S. 750, 761, 766.] No doubt, whether error is prejudicial or harmless is a question of importance to the parties to a litigation, for upon it may depend the choice of reversal or affirmance. But once the question is resolved, its significance is limited to the case in which it arises. It is not, therefore, a certiorari question, for pretty much the same reasons we have advanced in respect of the first of petitioners' questions. [See, pp. 17-19, *supra*.]

In determining that the trial court's exclusionary rulings were prejudicial the Court of Appeals relied upon the general rule applied by this Court in *McCandless v. United States*, 298 U. S. 342, 347-348. [R. 4000; *Pet.*, Appendix A, 63.] This Court there said, in respect of a ruling excluding evidence, that an "erroneous ruling which relates to the substantial rights of the party is ground for reversal unless it *affirmatively* appears from the whole record it was not prejudicial . . ."[18] [This Court's italics.] The Court of Appeals prefaced its quotation from *McCandless* with the comment—which seems to have drawn most of petitioners' fire—that it "cannot be said that the erroneous exclusion of evidence directly bearing on damages would not have affected the verdict. The error is therefore presumed to be prejudicial . . ."[19] [R. 4000; *Pet.* Appendix A, 63.] To say that when error is not shown to have been harmless it is presumed to

[18]This rule is thoroughly settled. See, among others, to the same effect as *McCandless*: *Weiler v. United States*, 323 U. S. 606, 611; *Williams v. Great Southern L. Co.*, 277 U. S. 19, 20; *United States v. Kirby-Konge Imp. Co.*, 260 U. S. 411, 421; *Bruno v. United States*, 308 U. S. 287, 293-294; *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 82.

[19]The excluded evidence went directly to the issue of damages. It controverted the petitioners' evidence that 1949 and 1950 had been profitable years [p. 13, *supra*]; it hit directly at Hodge's computations in a way that transformed his hypothetical gain into a further loss [pp. 15 to, *supra*]; it seriously weakened, if it did not destroy, any assumption that Winckler's sales or dollar volume in 1951 would have been even as great as they had been in previous years, let alone greater [pp. 13-15, *supra*]; and it would have enabled the jury to infer that Winckler's unprofitable operations in 1951 were not due to any wrongdoing by respondent but to the impairment of its financial position as the consequence of the milking process that had been carried on by its president and stockholders. [P. 16, *supra*.]

be prejudicial, is merely another way of saying that unless affirmatively shown to be harmless the error is ground for reversal; which is the *McCandless* rule.[29]

In view of the well settled nature of that rule it cannot properly be said that the Court of Appeals "departed from the accepted and usual course of judicial proceedings." [*U. S. S. C. Rev. Rules*, rule 19, subd. 1(b).]

Petitioners, even now, do not point to anything in the record from which there can be deduced the affirmative showing of no-prejudice that is necessary to bring the harmless-error rule into play. On the other hand it needs only a comparison of the excluded evidence with the damage and causation evidence produced by petitioners to see how substantial the excluded evidence was and how strongly persuasive it could have been with the jury. [See, note 19, p. 29, *supra*.]

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[29] In *Fillipon v. Albion Vein Slate Co.*, *supra*, 250 U.S. at 82, this Court said, "of course in jury trials erroneous rulings are presumptively injurious, . . . and they furnish ground for reversal unless it affirmatively appears that they were harmless." A similar articulation of the rule in terms of a presumption is found in *Majestic v. Louisville & N. R. Co.*, 6 Cir., 147 F. 2d 621, 627; and *Worcester v. Pure Torpedo Co.*, 7 Cir., 127 F. 2d 945, 947-948.];

In *Kotteakos v. United States*, *supra*, 328 U.S. at 765-766, the Court warned against "attempting to generalize broadly, by presumption or otherwise"; but added: ". . . The only permissible presumption would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting." In the case at bar, it is clear that the reference by the Court of Appeals to a presumption of prejudice was just such a particular one, dredged from the facts that the excluded evidence bore directly upon the issue of damages in a manner strongly favorable to the respondents, so that the errors in excluding it affected the substantial rights of the respondents; and those errors were not shown from the whole record to have been harmless.

Complaint is also made by petitioners that the Court of Appeals did not pass separately on each exclusionary ruling. [*Pet.*, 31.] But the whole point of the court's treatment of the matter is that the cumulative effect of the rulings was to deny respondents a fair trial; *i.e.*, to prevent respondents from making out a substantial part of their defense.[21] [R. 4000; *Pet.*, Appendix A. 63.] There is not even an intimation in the opinion that any one of the rulings discussed was not erroneous.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[21] Conceivably, any one of a series of rulings, taken by itself, may not be prejudicial; but when the cumulative effect of the series is to exclude a substantial part of a party's case, prejudice is shown. [*Vicuto v. Lizzo*, 148 App. Div. 104, 132 N.Y.S. 1000, 1000; *Gadstetter v. Market Street Ry. Co.*, 130 Cal. App. 316, 327, 20 P. 2d 93, 97.]